



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Hon. A. J. Bryan, Jr.  
Criminal District Attorney  
Hillsboro, T e x a s

Dear Sir:

ATT'N: Mr. Wm. B. Martin

Opinion No. O-1582

Re: (1) In a felony case, where the punishment of the defendant is assessed at a fine and a term in jail, and sentence is suspended, how long is the period of suspension, and when may the defendant have it removed?

(2) In such a case, does the suspension apply, also, to the costs in the case?

We have carefully considered your letter of recent date in which you request the opinion of this department touching the questions as stated above.

As a background to our opinion, we shall briefly discuss the suspended sentence law in Texas.

Article 776, Code of Criminal Procedure, provides:

**"SUSPENDED SENTENCE**

Where there is a conviction of any felony in any district or criminal district court of this State, except murder, perjury, burglary of a private residence at night, robbery, arson, incest, bigamy, seduction, and abortion, and the punishment assessed by the jury shall not exceed five years, the court shall suspend

sentence upon written sworn application made therefor by the defendant, filed before the trial begins. When the defendant has no counsel, the court shall inform the defendant of his right to make such application, and the court shall appoint counsel to prepare and present same if desired by defendant. In no case shall sentence be suspended except when the proof shall show and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this or in any other State. This law is not to be construed as preventing the jury from passing on the guilt of the defendant but he may enter a plea of not guilty."

The effect of the suspension of sentence under this statute is stated to be as follows in the case of BRITTIAN vs. STATE, 214 S. W. 351:

"Under our law there may be a suspended sentence awarded by a jury. In such case there would be no final conviction. Ex Parte Coots, 212 S. W. 173, recently decided. Where suspended sentence has been awarded, there can be no sentence, and the party is not punished, unless for some reason the suspended sentence be set aside as authorized by the statute \* \* \* (Emphasis ours).

Article 780, Code of Criminal Procedure, provides:

"DISMISSAL OF CHARGES

In any case of suspended sentence, at any time after the expiration of the time assessed as punishment by the jury, the defendant may make his written sworn motion for a new trial and dismissal of such case, stating therein that since such former trial and conviction he has not been convicted of any felony, which motion shall be heard by the court during the first term time after same is filed. If it appears to the court, upon such hearing, that

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the defendant has not been convicted of any other felony, the court shall enter an order reciting the fact, and shall grant the defendant a new trial and shall then dismiss said cause. After the setting aside and dismissal of any judgment of conviction as herein provided for, the fact of such conviction shall not be shown or inquired into for any purpose except in cases where the defendant has been again indicted for a felony and invokes the benefit of this law."

The effect of this statute is described as follows in the case of CLARK vs. STATE, 54 S. W. (2d) 127:

"\* \* \* That is to say, that the accused, at any time after the term of his conviction has expired, may, upon showing that he has not been subsequently convicted, be released from the suspended sentence by an order of the court  
\* \* \* That is to say, after the time for which one is convicted and placed under a suspended sentence has expired, it is not within the power of the court to recall the suspension and make the judgment final \* \* \*"

Finally, we notice Article 779, Code of Criminal Procedure, which provides:

**"SUSPENDED SENTENCE MADE FINAL**

Upon the final conviction of the defendant of any other felony pending the suspension of sentence, the court granting such suspension shall cause a capias to issue for the arrest of the defendant, if he is not then in the custody of such court, and during a term of the court shall pronounce sentence upon the original judgment of conviction, and shall cumulate the punishment of the first with the punishment of any subsequent conviction or convictions, and in such cases no new trial shall be granted in the first conviction."

When, therefore, the punishment of a defendant

is assessed at a jail sentence and a fine in some amount, and the sentence is suspended, he is neither liable for the fine nor bound to serve the jail sentence, except if and when the conditions of Article 779, supra, arise.

Article 780, supra, authorizes a dismissal of the charges "at any time after the expiration of the time assessed as punishment." (Emphasis ours). Neither this statute, nor any other statute, takes cognizance of a fine when assessed as extending or affecting the time after which the case may be dismissed. It must follow that the suspension period corresponds to the jail sentence, after which the charges are subject to dismissal under Article 780, supra.

We are not unmindful of the fact that the assessment of a fine, when sentence is suspended, thereby becomes meaningless as neither the payment of the fine may be exacted nor will any added period of suspension result. This, however, necessarily follows.

We turn now to your second question pertaining to the costs in the case. Here again we are compelled to recognize the effect of a suspended sentence as related to the successive steps of conviction by the jury, suspension of sentence, judgment of the court, and the sentence. In this connection we quote as follows from TEX. JUR., Vol. 12, p. p. 717 and 718:

"'Judgment' and 'sentence' are not the same thing; the two are distinct and independent. While a formal sentence is not necessary in a prosecution for misdemeanor, in a felony case it is the duty of the judge to pronounce sentence on the judgment of conviction and the sentence is in fact the final judgment in the case. In such a case it is the sentence, and not the judgment, which concludes the prosecution in the trial court; and a person cannot be said to have been convicted of a felony until sentence has been pronounced on him \* \* \*"  
(Emphasis ours).

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In support of these statements, there is cited the case of *McFADDEN vs. STATE*, 300 S. W. (2d) 54, which holds that sentence must be pronounced, in a felony case, notwithstanding the punishment assessed is a pecuniary fine or a jail sentence, or both; and the case of *BOWERS vs. STATE*, 13 S. W. (2d) 702, which holds that the "sentence" constitutes the final judgment in the case from which an appeal may be taken.

Further, under Article 780, *supra*, the court is compelled to grant the defendant a new trial and dismiss the case, after the expiration of the time assessed as punishment, upon proper proof that the defendant has not meanwhile been convicted of another felony. When this is done, for all purposes the original judgment is rendered of no force and effect except, only, where the defendant, upon a subsequent felony indictment, seeks to invoke the suspended sentence law again.

Accordingly, it cannot be said that the defendant has been "convicted" within the purview of the statutes on costs. No sentence is pronounced, hence a final judgment is not rendered; subsequently, a new trial may be granted and the case dismissed. Under such circumstances, we do not believe that the costs may be validly assessed against the defendant.

The only satisfactory analysis of a suspended sentence, under the statutes and cases in Texas, is that the effect of the punishment assessed, in all respects, is suspended, and the only subsequent fact that will render the defendant subject to serving the time, paying the fine, as assessed by the jury, and costs, and otherwise suffer the penalties of a conviction for a felony, is that of his being convicted of another felony during the period of the suspension.

Trusting that we have satisfactorily answered your inquiries, we remain

Very truly yours

ZCS:ob

APPROVED APR 4, 1940  
(Signed)  
W. F. MOORE  
FIRST ASSISTANT  
ATTORNEY GENERAL

OK  
WRK

ATTORNEY GENERAL OF TEXAS

By (Signed)  
Zollie C. Steakley  
APPROVED Assistant  
OPINION  
COMMITTEE  
BY B. W. B.  
CHAIRMAN